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No. 80-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

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May 1981

QUESTION PRESENTED

The question raised by the Petition of The Western Union Telegraph Company is whether an order of the Federal Communications Commission denying petitions to reject tariff filings is subject to judicial review when statutory complaint procedures are available and indeed are being pursued to assure the justness and reasonableness of the rates applicable upon the effectiveness of the tariff.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	7
APPENDICES	
APPENDIX A —Complaint of *Western Union Telegraph Co. v. AT&T,* FCC File No. E-80-34, Sept. 30, 1980 .	A-1
APPENDIX B —Erratum Notice, *Western Union Telegraph Co. v. AT&T,* filed Oct. 7, 1980	B-1

TABLE OF AUTHORITIES

	Page
Judicial Decisions:	
Aeronautical Radio Inc. v. FCC, No. 77-1333 (D.C. Cir. Nov. 5, 1980), *cert. denied*, 49 U.S.L.W. 3780 (U.S. April 20, 1981) (Nos. 80-1343, 80-1408)	*passim*
American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970)	5
American Telephone & Telegraph Co. v. FCC, 487 F.2d 865 (2d Cir. 1973)	6
Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963)	*passim*
Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800 (1973)	4
Papago Tribal Utility Authority v. FERC, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S.—, 101 S. Ct. 784 (1980)	*passim*
Southern Railway Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979)	*passim*
United States v. SCRAP, 412 U.S. 669 (1973)	4
Western Union Telegraph Co. v. FCC, No. 78-1955 (D.C. Cir. Jan. 13, 1981)	3, 4, 6
Administrative Decisions:	
AT&T (Docket No. 20099), 52 F.C.C.2d 727 (1975)	3
AT&T, Transmittal No. 13035 (Docket Nos. 20736, 21499), 69 F.C.C.2d 724 (1978)	2, 3
AT&T, Transmittal No. 13035 (Docket Nos. 20736, 21499), 70 F.C.C.2d 1294 (1978)	3, 6
In the *Matter of Western Union Telegraph Co. v. AT&T and the Bell System Operating Companies*, FCC File No. E-80-34, Sept. 30, 1980	2, 6
Statutes and Regulations:	
Communications Act of 1934, 47 U.S.C. § 151 *et seq.*	
Section 208, 47 U.S.C. § 208	6
47 C.F.R. § 61.38	5

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

Respondent, American Telephone and Telegraph Company ("AT&T"),[1] respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

[1] AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests in: The Pacific Telephone and Telegraph Company; The Southern New England Telephone Company; Cincinnati Bell Incorporated; and Cuban American Telephone and Telegraph Company.

STATEMENT OF THE CASE

In general, the petitioner's statement of the case sets forth adequately the facts required by this Court to rule on the instant Petition, and AT&T, for the purposes of this Opposition, accepts the petitioner's statement as written with three significant additions.[2]

First, omitted from the Petition is any reference to the procedural history subsequent to the FCC's denial of petitions to reject the tariffs which are at the heart of this action. On September 30, 1980, Western Union, at the very time that it was challenging before the Court of Appeals the FCC's refusal to reject the tariffs, commenced a formal complaint proceeding before the FCC challenging the validity of the same tariffs which were the subject of its appeal.[3] The propriety of such a complaint proceeding was specifically recognized by the FCC in its Order denying petitions to reject the challenged tariff.[4]

Second, omitted from petitioner's statement is the fact that the provisions of Western Union Contract Nos. 1 and 2 allowed either party to terminate the contract after a five-year notice period and that in 1973, the Bell System Companies lawfully exercised this contract right by giving Western Union appropriate notice that these contracts would terminate. Neither party now disputes the validity of the contract termination provision or that proper notice of termination was given to Western Union.[5]

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[2] References to appendices to Western Union's petition are cited herein as "P.A."

[3] *In the Matter of Western Union Telegraph Co. v. AT&T and the Bell System Operating Companies,* FCC File No. E-80-34. The complaint was filed on September 30, 1980, and is appended herein, as Appendix A. Exhibits to the complaint have been deleted. An "Erratum Notice" filed by Western Union on October 7, 1980 is Appendix B.

[4] *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 69 F.C.C.2d 724 (1978), see P.A. ¶ 3 at 32a.

[5] *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 69 F.C.C.2d 724 (1978), see P.A. ¶ 25 at 19a; see also complaint of Western Union, Appendix ¶ 6 at A-2.

Third, while Western Union claims that the tariffs replacing the Contracts would increase Western Union's rates by 150%, it fails to acknowledge that: (a) all Other Common Carriers ("OCCs") were paying rates substantially in excess of the Western Union Contract rates by virtue of the Settlement Agreement in Docket No. 20099,[6] to which Western Union was a party; and (b) the OCC rates, filed in accordance with the Docket No. 20099 Settlement Agreement, themselves reflect a significant discount from the rates paid by Bell customers for comparable private line services.

REASONS FOR DENYING THE WRIT

This Court recently decided the precise issues of reviewability raised in the instant petition in *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979). And this Court has recently denied review of two Court of Appeals decisions applying the law as set forth in that case: *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S.—, 101 S. Ct. 784 (1980); and *Aeronautical Radio Inc. v. FCC*, No. 77-1333 (D.C. Cir. Nov. 5, 1980), *cert. denied*, 49 U.S.L.W. 3780 (U.S. April 20, 1981) (Nos. 80-1343, 80-1408).

The Court of Appeals, in declining to review, as non-final,[7] the FCC's denial of Western Union's peititions for rejection or suspension,[8] applied well established legal principles consistent with the decisions of this Court. Furthermore, the Court of Appeals did not even find the issues in this case sufficiently

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[6] *AT&T (Docket No. 20099)*, 52 F.C.C.2d 727 (1975). For the purposes of Docket 20099, the following are generally understood to be OCCs: specialized common carriers; domestic satellite carriers; domestic record carriers; and international record carriers.

[7] *Western Union Telegraph Co. v. FCC*, No. 78-1955, (D.C. Cir. Jan. 13, 1981), see P.A. at 1a.

[8] *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 69 F.C.C.2d 724 (1978), see P.A. at 4a; *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 70 F.C.C.2d 1294 (1978), see P.A. at 30a.

unique to warrant an opinion, summarily dismissing petitioner's appeal in light of its decision in *Aeronautical Radio Inc. v. FCC ("ARINC"), supra.*[9] The question presented in the Petition is neither of national importance nor does it raise issues of substantial importance to anyone other than the parties. Nor does petitioner assert the existence of any conflict among the courts of appeals or with any applicable decision of this Court. Therefore, the Petition fails to present an appropriate question for this Court's consideration.

The decision below was required by the line of decisions establishing that reviewing courts lack authority to interfere with agency decisions concerning the effectiveness of tariff filings.[10] This Court, in *Southern Railway, supra,* held unreviewable the Interstate Commerce Commission's decision not to investigate a tariff revision. It thus allowed the tariff to become effective, even in the face of assertions that the rates in the tariff were patently illegal, reasoning that such a decision was committed to the discretion of the agency and that statutory complaint procedures remained available to allegedly aggrieved ratepayers. *See also Arrow Transportation Co. v. Southern Railway Co.,* 372 U.S. 658 (1968). The Court of Appeals in *Papago Tribal Utility Authority, supra,* following the reasoning of *Southern Railway,* found generally unreviewable an agency decision to accept a carrier-initiated tariff, stating that the decision whether to "accept a rate filing is based on precisely the same information, and primarily the same considerations, that govern decisions to suspend or not to suspend, to investigate or not to investigate." 628 F.2d at 243. The Court of Appeals stressed that it was loath to "intervene in the midst of agency proceedings" as to do so would be "to disrupt the administrative process." *Id.* at 238.

Western Union here asks this Court to reverse itself but fails to raise significant issues which permit departure from

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[9] See *supra,* n. 7.

[10] *E.g., Arrow Transportation Co. v. Southern Railway,* 372 U.S. 658 (1963); *United States v. SCRAP,* 412 U.S. 669 (1973); *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade,* 412 U.S. 800 (1973).

prior controlling decisions. First, petitioner raises the question of compliance with important "threshold requirements" established by the Commission (Petition, pp. (i), 9), in particular, the FCC's cost support filing requirements, Section 61.38 (47 C.F.R. § 61.38), asserting that non-compliance with this FCC rule provides a sufficient basis for distinguishing the instant case. This very issue was present in *Papago, supra,* where the court, quoting *American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 536-39 (1970), held that such filing requirements are "merely aids to the exercise of the agency's independent discretion, . . . giving rise to no duty in the agency and no power of review in the courts." *Id.* at 247. The court below thus followed its own precedent that, in turn, rested on rules of unreviewability established by this Court in *American Farm Lines, supra,* and consistently followed thereafter. *See also Southern Railway, supra.*

Second, the Petition raises the argument that the availability of "the statutory complaint remedy is patently inadequate to redress the [competitive] injury" Western Union claims it would suffer from increased rates in the subject tariffs (Petition, p. 11). But, neither *Southern Railway, supra,* nor *Arrow, supra,* depended upon the availability of alternative forms of relief such as complaint procedures. While in *Southern Railway* this Court acknowledged that the availability of complaint procedures is a factor strongly weighing against reviewability, 444 U.S. at 463, the Court did not rest its decision on that basis alone. Rather, *Southern Railway,* established that non-reviewability of agency determinations to accept, or to refuse to reject, investigate or suspend tariffs, is independent of the availability of a complaint procedure. *Id.* at 459 n.12, 463-464. In any event, *Southern Railway, Papago, supra,* and *ARINC, supra,* make it clear that the availability of a complaint procedure alone suffices to render the agency tariff decision unreviewable.[11] The Communications Act provides such a

[11] The Court of Appeals in ARINC stated: "The *Papago* and *Southern Railway* cases require us to hold that the availability of a complaint procedure renders the FCC's [tariff] acceptance decision in this case non-final." Slip Op. at 27-28.

complaint procedure, 47 U.S.C. §208,[12] and, indeed, petitioner has availed itself of that remedy.[13] Further, as for petitioner's competitive injury claim, this court, in *Arrow, supra,* despite the petitioners' claim there that allowing tariff rates to become effective would "inevitably and immediately" drive them out of business, held suspension decisions to be non-reviewable. 372 U.S. at 672-73; *see also Southern Railway,* 442 U.S. at 459 n.12. Hence petitioner's second argument also fails to present a question warranting review.

On April 20, 1981, this Court denied petitions for certiorari in *ARINC, supra.* The Court of Appeals in the decision below, summarily dismissed this petitioner's appeal in light of its decision in *ARINC,* which held that an agency decision allowing a tariff revision to become effective is unreviewable because it does not finally determine the lawfulness of the revised tariff.[14] Moreover, in the instant case there are additional reasons for the Court to deny the Petition and to permit the administrative process to proceed to conclusion. First, here, the Commission has assured Western Union that there are two ongoing proceedings in which "all of the rates and charges now applicable to WU [Western Union] ... will be fully investigated";[15] these proceedings provide relief in addition to the remedy available to Western Union under the complaint procedures of the Communications Act, 47 U.S.C. §208, *supra.* Second, here, Western Union has already invoked the FCC's complaint process[16] providing all the more reason to adhere to traditional principles of finality and permit ongoing administrative proceedings to progress to conclusion under the statutory ratemaking scheme of the Communications Act.[17]

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[12] For the text of 47 U.S.C. § 208, see P.A. at 40a.

[13] See *supra,* n. 3.

[14] See *supra,* n. 7.

[15] *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 70 F.C.C.2d 1294 (1978), see P.A. ¶ 3 at 32a.

[16] See *supra,* n. 3.

[17] See *e.g., Papago, supra,* 628 F.2d at 238; *Arrow, supra,* 372 U.S. at 669-672; *American Telephone and Telegraph Co. v. FCC,* 487 F.2d 865, 872 (2d Cir. 1973).

CONCLUSION

The Court of Appeals correctly applied the principles established by this Court. The interlocutory character of the Commission's tariff rejection denials stands as ample reason to deny the Petition. Moreover, the decision below neither conflicts with the decision of any other court of appeals nor presents a question of national importance. The Petition has failed to show any reason why this Court should review any aspect of the decision. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1981

APPENDICES

APPENDIX A

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY, *Complainant,* v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM OPERATING COMPANIES.	**File No. E-80-34** **Docket No.**

To: The Commission

COMPLAINT

Pursuant to Sections 201, 202, 204, 206, 207, 208 and 209 of the Communications Act, as amended, and Section 1.721, *et seq.* of the Commission's Rules and Regulations, The Western Union Telegraph Company ("Western Union") hereby files this Complaint against the American Telephone and Telegraph Company and its affiliated Bell System Operating Companies (collectively, the "Bell System"). In support thereof, Western Union respectfully shows as follows:

1. Complainant Western Union is a communications common carrier subject to the Commission's jurisdiction under Title II of the Communications Act. Its address is One Lake Street, Upper Saddle River, New Jersey.

2. Defendant American Telephone and Telegraph Company ("AT&T") is a communications common carrier subject to the Commission's jurisdiction under Title II of the Communications Act. Its address is 195 Broadway, New York, New York.

3. Defendants the Bell System Operating Companies ("BSOCs") are communications common carriers subject to the Commission's jurisdiction under Title II of the Communications Act. A list of the companies and their addresses is attached hereto and incorporated herein as Exhibit A.

4. Commencing on October 1, 1978, and continuing to the present, Western Union has leased from the Bell System, pursuant to tariff, facilities for use in providing interstate common carrier services to the public within the continental United States. Facilities that commence within one state and terminate in another state are leased by Western Union from the AT&T Long Lines Division, under the rates and charges set forth in FCC Tariff No. 266, Facilities for Other Common Carriers. Facilities that commence and terminate within the same state are leased by Western Union from the individual BSOCs, under the rates and charges set forth in each company's Facilities for Other Common Carriers tariff. A list of all tariffs under which Western Union has leased or continues to lease the subject facilities (the "Bell tariffs") is attached hereto and incorporated herein as Exhibit B.

5. Prior to October 1, 1978, Western Union leased facilities for use in providing common carrier services to the public pursuant to contractual arrangements between Western Union and the Bell System (the "Bell-Western Union contracts"). Certain other facilities, including foreign exchange, common control switching arrangements and domestic satellite service were leased prior to October 1, 1978, and continue to be leased, under the terms of the applicable Facilities of Other Common Carriers tariffs.

6. The Bell-Western Union contracts were negotiated at arms-length between the parties. They became effective in January 1970, and were filed with the Commission pursuant to Section 211(a) of the Communications Act, 47 U.S.C. § 211(a). Following duly filed notice by the Bell System, the contracts expired on September 30, 1980.

7. In place of the facilities offerings under the expired Bell-Western Union contracts, the Bell System unlawfully has

applied to Western Union facilities offerings contained in the Bell tariffs, as listed on Exhibit B. Prior to expiration of the Bell-Western Union contracts, Western Union duly protested to the Commission application of the Bell tariffs to Western Union. Western Union's claims for declaratory and other relief were denied by the Commission in a Memorandum Opinion and Order released on October 12, 1978 (FCC 78-691). On October 19, 1978, the Commission adopted a second Order clarifying the previous Order (FCC 78-746). The lawfulness of the Commission's Orders is now the subject of a pending petition for review in the United States Court of Appeals for the District of Columbia Circuit, *Western Union Telegraph Co. v. FCC*, No. 78-1955. Subsequently, on June 5, 1980, AT&T and the Bell System were permitted by the Commission to revise those tariffs by increasing the rates contained therein. *See* Mimeo No. 32427, adopted by Chief, Common Carrier Bureau, June 4, 1980. The lawfulness of that increase is also pending before the United States Court of Appeals for the District of Columbia Circuit. *MCI Telecommunications Corp. v. FCC*, No. 80-1624.

8. The charges set forth in the Bell tariffs are substantially in excess of those set by the Bell-Western Union contracts, despite a long-term trend downward in the costs of providing long-distance circuitry, which comprises the bulk of the facilities leased by Western Union under the Bell tariffs. Upon information and belief, the rates and charges contained in the Bell tariffs, both before and after they were revised upward on June 5, 1980, are substantially in excess of the costs of providing the subject facilities to Western Union, and are therefore unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b).

9. Application of the Bell tariffs to Western Union has resulted in unreasonable discrimination against Western Union in violation of Section 202(a) of the Communication Act, 47 U.S.C. § 202(a), as follows:

a. In certain markets the rates and charges applicable to Western Union under the Bell tariffs are unreasonably

and unjustly discriminatory in that Western Union is required to pay more for facilities leased from the Bell System for use in providing in retail service (rendered via Western Union's own network as well as the Bell supplementary facilities) than the Bell System charges for the identical retail service (provided solely via its own facilities). Thus, Western Union is being charged more for a portion of a service than retail customers are charged for the entire service. The nature of the resulting unreasonable discrimination against Western Union is set forth more fully, with examples of the operation and effect of such discrimination, in the affidavits of Frank M. McGarry and James F. Toner, submitted in support of Western Union's Petition for a Declaratory Order (filed July 27, 1978). Those affidavits are attached hereto as Exhibits C and D and incorporated herein.

b. The OCC tariffs filed by the BSOCs are unreasonably and unjustly discriminatory on their face, in that the rates charged for facilities under the BSOC tariffs vary greatly from state to state and from one Bell company to another; the rates charged for such facilities are in many instances higher than the intrastate private line rates charged by the BSOCs; and the rates applicable to Western Union are in many cases higher than the rates AT&T charges its own retail customers for such channels, especially for distances of 200 miles and up. The nature of the resulting unreasonable discrimination against Western Union is set forth more fully, with examples of the operation and effect of such discrimination, in Western Union's July 27, 1978, Petition for a Declaratory Order, at 32-40, and Petition to Suspend and Investigate the BSOCs' revised telegraph grade offerings, at 8-11. The excerpts from these petitions are attached hereto as Exhibits E and F and incorporated herein.

10. Under the Bell tariffs, the Bell System has refused, in contravention of Sections 201 and 214 of the Communications Act, 47 U.S.C. §§ 201, 214, to continue to lease to Western Union certain base group and supergroup channels previously

leased to Western Union under the Bell-Western Union contracts. In addition to protesting this refusal in connection with its protests of the October 1, 1978 tariff revisions, Western Union has petitioned the Commission to hold that the withdrawal of base group and supergroup channels in the absence of Commission certification under Section 214 of the Communications Act is unlawful and to require the Bell System to continue to provide such facilities. The Commission, however, has denied relief to Western Union (FCC 79-726), and the lawfulness of the Commission's action is subject to a petition for review now pending in the United States Court of Appeals for the District of Columbia Circuit. *Western Union Telegraph Co. v. FCC*, No. 80-1045.

11. As a consequence of the unlawful actions of the Bell System described in paragraphs 7 through 10, Western Union has been forced to pay excessive and unreasonable charges for facilities leased from the Bell System and to lease facilities from other carriers at higher rates than Western Union paid to the Bell System for the same or similar facilities under the Bell-Western Union contracts. In addition, Western Union has been forced to expand its own facilities, at substantial expense, to reduce the necessity for leasing Bell System facilities pursuant to the unlawful Bell tariffs. In some instances Western Union has been forced by the Bell System's unlawful actions to raise its rates to its own customers, which has resulted in loss of some customers and loss of substantial profits that otherwise would have been earned by Western Union on services provided to those customers. In all these respects, the Bell System's unlawful actions have damaged Western Union.

12. Western Union estimated, prior to expiration of the Bell-Western Union contracts, that the substitution of tariffed rates for the facilities leased under the Bell-Western Union contracts would result in increased charges amounting to $37 million annually, as applied to the existing complement of leased facilities (not including lease of foreign exchange, common control switching arrangements and domestic satellite service facilities). Because the complement of facilities leased

by Western Union under the contracts and the Bell charges for those facilities have changed since October 1, 1978, and may change again prior to decision on this Complaint, total overcharges cannot be estimated with any certainty at this time. Similarly, the amount of other damages incurred by Western Union cannot be calculated with certainty at this time.

13. Western Union has not filed any suit in another court requesting an award of money damages under Sections 208 and 209 of the Communications Act, 47 U.S.C. §§ 208, 209.

Wherefore, Western Union asks an award of money damages, pursuant to Sections 208 and 209 of the Communications Act, to indemnify Western Union for all losses sustained as a result of the Bell System's unlawful actions described herein, plus interest, and for such other and further relief as may be deemed appropriate.

Dated at Washington, D.C. this 30th day of September, 1980.

THE WESTERN UNION TELEGRAPH COMPANY

By .....
Wm. Warfield Ross
William R. Weissman

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APPENDIX B

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October 7, 1980

Mr. William J. Tricarico
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20554

Re: Erratum notice
The Western Union Telegraph Company v. American Telephone and Telegraph Company and Bell System Operating Companies

Dear Mr. Tricarico:

On September 30, 1980, The Western Union Telegraph Company filed a formal complaint against the American Telephone and Telegraph Company and the Bell System Operating Companies. The purpose of this letter is to correct a typographical error in the complaint, as follows:

p. 3 paragraph 6

". . . the contracts expired on September 30, 1980"
should read
". . . the contracts expired on September 30, 1978."

Very truly yours,

William R. Weissman
Counsel for The Western Union
Telegraph Company

WRW/ew
cc: Philip Verveer, Esquire
Gerald E. Murray, Esquire